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BEFORE THE
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
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In re)
)
Amendment of Section 73.202(b),) MM Docket No. 94-116
Table of Allotments,) RM-8507
FM Broadcast Stations) RM-8567
(Jefferson City, Cumberland Gap)
and Elizabethton, Tennessee; and)
Jonesville, Virginia))

TO: Chief, Policy and Rules Division
Mass Media Bureau

FURTHER COMMENTS

Holston Valley Broadcasting Corporation (HVBC), by its attorney, hereby respectfully submits its Further Comments in the above-entitled matter, in support of its November 25, 1994 "Counterproposal" seeking the allocation of Channel 256A at Jonesville, Virginia. In so doing, the following is shown:

Preliminary Statement

1. HVBC's "Counterproposal" was accepted by the Commission by a Public Notice, Report No. 2048, released December 21, 1994. As a result thereof, interested parties have been afforded fifteen days from the release of said Public Notice, until and including January 5, 1995, in which

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to file further comments for or against in this matter. HVBC hereby exercises its opportunity to submit timely further comments in this docket.

2. On December 12, 1994, Eaton P. Govan III and Berton B. Cagle, Jr. (G&C), the proponents of RM-8507 seeking the deletion of Channel 257A from Jefferson City, Tennessee and the addition of Channel 256A at Cumberland Gap, Tennessee and the modification of WEZG's license to specify Cumberland Gap as the new community of license, filed "Reply Comments" in this proceeding. Unable to meaningfully advocate Cumberland Gap as preferable to Jonesville for purposes of 47 U.S.C. §307(b), G&C has resorted to an attack on the motives of HVBC. G&C has intimated that HVBC's Jonesville proposal is a "'strike' petition" (G&C "Summary").

3. HVBC now responds to G&C's reckless and defamatory charges. HVBC has operated broadcasting stations under the ownership of the Boyd family for almost three decades, and is proud of its record of service to the public. In that time, HVBC has constructed or modified numerous AM, FM, TV, LPTV and translator stations and has always kept its

promises to the Commission. HVBC fully intends to apply for, construct and operate a new FM station at Jonesville, Virginia in the public interest. HVBC had every right to file the "Counterproposal" that it filed. For the reasons stated below, G&C's unfortunate December 12 missive must be rejected.

HVBC's Right to Petition the Government

4. The filing of a "petition for rulemaking" or a "counterproposal" is a privileged activity under that portion of Amendment 1 to the federal Constitution which guarantees *inter alia* the right to petition the government for a redress of grievances. The Commission has recognized as much in **Gill Industries, Inc.**, 56 FCC 2d 765, 35 RR 2d 911, 915 (1975):

When concerted efforts are directed to influence the action of an administrative agency, whatever the purpose, such activities are protected as an exercise of free speech and of the right to petition the government and are not subject to Sherman Act sanctions. See **California Motor Transport Co. v. Trucking Unlimited**, 404 U.S. 508, 92 S. Ct. 609 (1972); **United Mine Workers of America v. Pennington**, 381 U.S. 657, 85 S. Ct. 1585 (1965); **Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.**, 365 U.S. 127, 81 S. Ct. 523 (1961).

5. Furthermore, HVBC has a right to participate in a channel allocation proceeding (or vacant channel application proceeding) and to attempt to put forth a proposal which can be granted a dispositive Section 307(b) preference. The Commission has specifically held that it is not a misrepresentation or an abuse of process for a party to seek such a dispositive Section 307(b) preference. **Sunshine Broadcasting, Inc.**, 101 FCC 2d 476, 58 RR 2d 551, 552 (Rev. Bd., 1985), rev. den., 1 FCC Rcd 174, 61 RR 2d 386 (1986).

6. G&C cite **Grengo, Inc.**, 28 FCC 2d 166 (1971) and **Millar v. FCC**, 707 F.2d 1530, 1535 (D. C. Cir. 1983) for the proposition that HVBC's "Counterproposal" is a "strike" pleading. Of course, one essential element of a "strike" pleading is whether or not the filer conducted a frequency study.¹ Prior to the filing of its "Counterproposal", HVBC investigated all commercial FM channels to determine whether one or more FM channels were available at Jonesville; HVBC

¹See e.g. **Sumiton Broadcasting Co., Inc.**, 14 RR 2d 1000, 1006-07 (Rev. Bd. 1968). **Sumiton**, which reached the District of Columbia Circuit *sub nom. Millar v. FCC*, *supra*, involved efforts by an existing licensee to use a company in which it was the undisclosed real party in interest to frustrate a Form 301 application of another party. This situation is clearly not present in this case.

found that exactly one such FM frequency, Channel 256A, was available.

7. Therefore, G&C's speculation as to HVBC's motives must be rejected, not only because it is rank speculation, but because HVBC's right to petition the Commission, and to successfully prosecute its petition, are guaranteed both by the federal Constitution and by Commission precedent.

Other Matters

8. One pernicious aspect of G&C's December 12 missive is its attempt to inject past failed business negotiations between G&C and HVBC into this proceeding. First, such negotiations have absolutely nothing to do with the above-captioned case. Second, such negotiations are private matters and outside the jurisdiction of the Commission. See e.g. **Eagle Radio, Inc. (KEGL)**, 9 FCC Rcd 1294, ¶8 (1994); **Anthony R. Martin-Trigona**, 54 RR 2d 715, 716 (1983).²

²HVBC emphatically states that it has every right to take competitive actions and to promote its programming format by such legal and legitimate means as may be available to it. Such means would include, for example, the purchase of a minority interest in another station in the Tri-Cities market, or a "local marketing" or "time brokerage" agreement with another station in its market. Of course, any such agreement would be subject to the Commission's rules. While HVBC had negotiations with G&C, there was nothing illicit in such negotiations. HVBC has

9. Next, G&C tries to make something out of nothing by seeking to find a sinister motive in the timing of HVBC's "Counterproposal". As G&C readily concede, the availability of Channel 256A at either Jonesville or Cumberland Gap will not exist until HVBC's WTFM receives a covering license for its change of transmitter site from Bays Mountain (just south of downtown Kingsport) to Holston Mountain (considerably east of Kingsport) pursuant to its construction permit, File No. BPH-930121ID). As that move was in its planning stages when G&C filed its petition, HVBC had no reason to file its petition at an earlier time. Indeed, HVBC would just now be preparing its petition had G&C's proposal not been publicly announced by the *Notice of Proposed Rulemaking* in this case and a deadline of November 28, 1994 imposed by the Commission for mutually-exclusive proposals. And, as noted above, Channel 256A is the only FM channel which HVBC's study has found to be allocable to

the right to seek business arrangements which serve its best interests, so long as those arrangements are lawful and consistent with the FCC's rules, if for no other reason to remain competitive in its market. HVBC would only enter into agreements which conform in all respects to law and FCC regulations.

Jonesville. Thus, November 28, 1994 was "now or never" for a Jonesville FM proponent to come forward.

10. The Commission should be aware that HVBC has definite plans for the Jonesville FM station, should HVBC have the good fortune of prevailing in this case and thereupon being granted a construction permit. AS G&C is aware, HVBC established in 1988 The WKPT Radio Network, which now consists of three AM stations, two of which are owned by HVBC (the third is owned by a non-related third party). This network programs a "nostalgia" music format unique in the northeast Tennessee/southwest Virginia area, plus a heavy schedule of local news and sports. HVBC would program its Jonesville FM station with The WKPT Radio Network. It is believed that such a format, which would include local news and sports for Lee County, Virginia, would serve the public interest, convenience and necessity. That is why HVBC filed its "Counterproposal" in this case. G&C's allegations of "strike" pleading are nothing more than a whine made from sour grapes.

11. In addition to its speculation regarding HVBC's Jonesville FM plans, G&C provide great detail on the reasons

it contends that WEZG(FM) (formerly WUSK-FM), Jefferson City, Tennessee, is not a strong performer in the Arbitron ratings for the Knoxville, Tennessee radio market. With respect to G&C's recitation in this regard, HVBC makes the following observations.

12. Many months prior to the change of program formats by G&C's WEZG(FM) and WAEZ(FM) (formerly WUSJ), Elizabethton, Tennessee from country/western music to "soft adult contemporary" music³. Based upon HVBC personnel listening to these stations at various hours over a period of months, HVBC believes the same news and other informational non-music programming is and has been broadcast on both stations, despite the fact that the centers of the Tri-Cities and Knoxville radio markets are roughly 100 miles apart. While it is one thing to simulcast the same programming on two or more stations serving the same metropolitan area with common problems, needs and interests, it is quite another to broadcast to the citizens

³WEZG(FM) essentially simulcasts all of the programming originated by WAEZ(FM). WEZG(FM) is licensed to a community in the Knoxville radio market, while WAEZ(FM) is licensed to a community in the Tri-Cities radio market.

of a distant community in a different market the same programming designed to serve listeners in another market.

13. Of course, there were periods of several hours when WAEZ's programming were not heard in Jefferson City on WEZG. G&C apparently had the rights to broadcast University of Tennessee football in the Tri-Cities market, but not in the Knoxville market. Accordingly, when WAEZ carried play-by-play of "the Big Orange", G&C apparently simply turned off the transmitter of WEZG, in possible violation of the Commission rule governing the minimum operating schedule for AM and FM stations, 47 C.F.R. §73.1740(a)(1). In any event, G&C's lack of effort to separately program WEZG and G&C's apparent practice of repeatedly taking WEZG off the air during prime listening periods showed a marked disregard for the people of Jefferson County, Tennessee.

14. Given these facts, can it be a surprise that HVBC has formed an opinion that G&C's lack of programming and/or promotional efforts in Jefferson County, Tennessee has resulted in low or non-existent ratings for WEZG in Jefferson County.

Conclusion

15. For all of the foregoing reasons, G&C's opposition to HVBC's "Counterproposal" (RM-8567) is without merit; for all of the positive reasons advanced by HVBC in this docket, the Commission must grant HVBC's "Counterproposal" and allocate Channel 256A to Jonesville, Virginia.

Respectfully submitted,

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By



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January 5, 1995

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Further Comments" was served by first-class United States mail, postage prepaid, on this 5th day of January, 1995, upon the following:

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